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October 28, 2020

Via Email

Vanessa A. Countryman, Secretary
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Release No. 34-90112
File No. S7-13-20

Dear Ms. Countryman:

The undersigned appreciates the opportunity to comment on the above-referenced release (the "Release"). The Release notes the various factors that have been used by the courts and the U.S. Securities & Exchange Commission (the "SEC") to determine whether a person may be acting as a broker and subject to registration and regulation under the Securities Exchange Act of 1934, as amended (the "1934 Act"). As a result, it has been very difficult for securities counsel to provide definitive advice to small business issuers on their use of individuals not registered with the SEC as brokers to "find" investors, an issue that was highlighted in two thoughtful reports prepared by the organized bar in 2005 and 2010.¹

Therefore, the SEC Commissioners and staff are to be commended for issuing the Release which, by adopting a specific registration exemption under the 1934 Act (the "Finders Exemption"), brings some much needed clarity and legal certainty to the issue of finders representing small business issuers undertaking securities offerings exempt from registration under the Securities Act of 1933, as amended (a "Finder").

My comments are based upon 40 years' experience as a securities practitioner, securities regulator and legal academic.² The views expressed herein are my own and do not constitute the views or positions of the law firm with which I am or have been associated or any client thereof, any academic institution with which I am or have been associated or any governmental or non-governmental organization with which I have been associated.

¹ Report and Recommendations of the Task Force on Private Placement of Broker-Dealers of the Section of the Section of Business Law of the American Bar Association (July 2010 and May 2005).

² Partner, Bybel Rutledge LLP; Visiting Professor of Securities Law, BPP University Law School (London); Tutor, School of Finance and Management, University of London (UK); former Adjunct Faculty at Widener Commonwealth University School of Law and The Dickinson School of Law of the Pennsylvania State University; and former general counsel, Pennsylvania Securities Commission.

The following responds to the questions posed in the Release which are addressed *ad seriatim*.

#1. The Finders Exemption will be effective uniformly across the country only if the states provide parallel exemptions from their broker-dealer registration requirements. Section 401(b) of the Uniform Securities Act (1956) (the "1956 Act") defines an "agent" as "an individual other than a broker-dealer who represents a broker-dealer or an issuer in effecting or attempting to effect purchases or sales of securities."³

If an individual met the requirements of a Tier I Finder or a Tier II Finder under the Release and received compensation for finding or soliciting investors, the individual most likely would be viewed as acting as an agent of the issuer under state securities laws and be required to register as such with the applicable state jurisdiction even though the individual would be exempt from registration as a broker under the 1934 Act in reliance on the Finders Exemption.⁴

Furthermore, Section 201(b) of the 1956 Act makes it "unlawful for an issuer to employ an agent unless the agent is registered." A number of states have incorporated this provision into their securities laws.⁵ Therefore, if a small business issuer engaged an individual who qualified as a Tier I or Tier II Finder under the Release and paid compensation to such individual, the issuer may have violated the securities laws of those jurisdictions which have adopted provisions consistent with Section 201(b) of the 1956 Act if the individual was not registered or exempt from registration as an agent in that state. If the state adopted an exemption from agent registration which paralleled the Finders Exemption proposed in the Release, both the Finder and the issuer who engaged the Finder would not be in violation of state law.

#2. It appears that, by establishing two categories of Finders, the SEC is appropriately distinguishing between those who merely identify potential investors (similar to the activities addressed in the *Paul Anka* letter) and those who may interact with investors which is the more likely activity. Referring to each as a Tier I Finder and Tier II Finder is an appropriate shorthand method of describing the permitted activities of each under the Finders Exemption if the SEC adopts the Finders Exemption as fundamentally proposed.

However, a concern with providing an exemption for Tier I Finders is the potency that an individual could compile a list of physicians from public sources on the belief that all physicians would meet the accredited investor standard and then try to sell the list to small business issuers. Unbeknownst to the small business issuer purchasing the list, the Tier I Finder may not have had any prior relationship with persons on the list or their interest in purchasing illiquid securities of a small business issuer.

The activities permitted by a Tier II Finder would be immensely more advantageous to small business issuers and align more precisely with the activities in which most Finders would

³ Section 102(2) of the Uniform Securities Act (2002) includes a similar definition of "agent."

⁴ Registration as an issuer agent under state securities laws usually requires, at a minimum, filing of an application on Form U-4 and passing a required examination. See 10 Pa. Code §303.013.

⁵ See Section 301(b) of the Pennsylvania Securities Act of 1972; Section 49:3-56(h) of the New Jersey Uniform Securities Act and Section 11-402(a) of the Maryland Securities Act.

engage. Therefore, it is suggested that the SEC eliminate the Tier I Finder category and adopt a single exemption encompassing the activities permitted Tier II Finders.

#3. In its safe harbor rule on when associated persons of an issuer would not be deemed to be a broker, the SEC defined the term “associated person” as a natural person.⁶ It would seem consistent with Rule 3a4-1 and appropriate in context of the limitation of a Tier I Finder to a single issuer in a 12 month period to limit a Tier I Finder to natural persons.

With respect to Tier II Finders, the Release does not appear to place any limitation on the number of issuers which such Finder may represent at any given time. This could give rise to firms that could specialize and advertise as being Finders and employ persons (or use independent contractors) who would perform activities permitted by the Finders Exemption. It appears that the intention of the Release is to provide some regulatory clarity to individuals who may assist small business issuers in finding investors rather than encouraging the formation of a new cottage industry of firms touting their ability to find persons willing to invest in small businesses.

In that regard, it would seem appropriate that Tier II Finders also be limited to natural persons with the only exception being a corporate entity that is wholly owned by a single natural person, such as a single-member limited liability company, where the individual prefers to offer services through an entity.

#4. Given the stated purpose of the Release to assist U.S. small business issuers in the capital formation process, the Finders Exemption should be available only for Finders who are natural persons legally permitted to reside and work in the U.S.⁷ However, given the geographic proximity, established deep commercial relationships and similar securities regulatory framework, the SEC may consider including natural persons who are legally permitted to reside and work in Canada.

#5. The Release states that a Finder would not handle customer funds or securities, have the power to bind the issuer or an investor, be involved in structuring the transaction or negotiating the terms of the offering, participate in preparation of any sales materials, perform any independent analysis of the sale, engage in any due diligence activities or assist or provide financing for such purposes.⁸ All of these represent important investor protections and should be included in the “line item” conditions for the availability of the Finders Exemption set forth on page 18 of the Release.

One permitted activity of a Tier II Finder is to “discuss issuer information included in any offering materials, provided that the Tier II Finder does not provide advice as to the valuation or advisability of the investment.” Most securities offered by small business issuers are illiquid and are subject to significant risks, including loss of the entire investment.

⁶ 17 CFR 240.3a4-1.

⁷ Release, page 3.

⁸ Release, p. 28.

Where an investor would experience a subsequent loss of his or her investment, it should come as no surprise that the investor may allege that the discussion of the issuer's offering materials with the Finder resulted in the Finder making material misstatements or omissions of material facts and the investor would not have invested but for what the Finder said or didn't say in such discussions which, from an evidentiary perspective, will result in credibility issues.

The Release has attempted to address this problem by stating that a Tier II Finder may discuss "issuer information included in any offering materials." What if there are no issuer offering materials? Rule 502(b)(1) of SEC Regulation D states that an issuer is not required to furnish information to purchasers otherwise required by that provision when it sells securities to any accredited investor which is the only type of investor with whom a Tier II Finder may discuss an investment in an issuer.⁹

Admittedly, this is a difficult issue. On the one hand, it may be helpful for a small business issuer to have a person who can explain the business of the issuer, mechanics of the offering, the risks of investing and application of the use of proceeds. On the other hand, a Finder whose compensation is based on the value of the transaction may be tempted to stray beyond what may be in the issuer's offering materials (if any exist) and "say whatever it takes" to convince the prospective investor to invest in the offering.

A suggested middle ground may be to require, as condition of the availability of the Finders Exemption, that the issuer being represented by the Finder must provide the Finder, who in turn, must provide the person being solicited, with written offering materials which describe the risks of the offering, the terms of the offering, a description of the security being offered, the use of proceeds, background of management, fees to be received by the issuer or its affiliates, capitalization of the issuer and management-prepared financial information, summary of any material organizational documents (eg operating agreement of a limited liability company), summary of material agreements (including those between the issuer and affiliates of the issuer), any conflicts of interest and any tax issues.

This requirement also should include a mandate that the offering materials contain a statement that no person, including any Finder relying on the Finders Exemption, is permitted to furnish any information or make any statements that are not contained in the offering materials.

#6. Section 4(a)(6) of the Securities Act of 1933, as amended (the "1933 Act"), which contains the statutory exemption for crowdfunding offerings and the framework for Regulation Crowdfunding, includes investment limitations, even for accredited investors although it must be emphasized that such limitations were the result of a statutory enactment and not SEC rulemaking. To the extent that Finders may identify investors for an offering made in reliance on Regulation Crowdfunding, those investors would be subject to the applicable limitations on investment set forth therein and issuers would be subject to a maximum offering amount.

In contrast, the SEC, by rule, permits issuers to offer securities to accredited investors in exempt transactions under Rule 506 of SEC Regulation D and Tier 2 offerings under SEC Regulation A

⁹ 17 CFR 230.501(b)(1).

without any investment limitations.¹⁰ Therefore, using an accredited investor standard with respect to those investors who may be solicited by Finders appears to be consistent with prior SEC rulemaking as to which no investment limitation applies and therefore, no investment limitation should be imposed under the Finders Exemption.

Furthermore, recent revisions to the definition of accredited investor provide the SEC with administrative flexibility to include additional categories of persons as accredited investors and therefore, using this definition would not result in a static pool of potential investors.¹¹

#7. The undersigned urges the SEC to provide additional guidance relating to the general solicitation prohibition. Does this mean that a Finder is prohibited from advertising his or her services as a Finder? Does it mean that the Finder cannot engage in general solicitation relating to the issuer's offering? Does it mean that the Finder cannot generally advertise for investors interested in investing in exempt offerings of small business issuers? The general solicitation prohibition may encompass all the above.

A potential problem for a small business issuer is that the Finder, unbeknownst to the issuer, may engage in activities that could constitute general advertising or general solicitation with respect to the issuer's securities offering which, if the offering was being made in reliance upon an exemption that prohibits use of general solicitation or general advertising, would make the exemption unavailable to the issuer.

The Release advises that an issuer's failure to comply with the conditions of the exemption from registration under the 1933 Act would not affect the ability of the Finder to rely on the Finders Exemption if the Finder can establish that he or she did not know and, in the exercise of reasonable care, could not have known of the compliance failure by the issuer.¹²

It is suggested that the SEC adopt a similar position with respect to issuers as it has with respect to Finders. The SEC should consider adopting a "safe harbor" whereby it would not view such exemption as unavailable under these circumstances if the issuer did not know, and in the exercise of reasonable care, could not have known of the Finder's activities which constituted a violation of a condition of the exemption being relied upon by the issuer.

At the very least, the SEC should deem the exemption unavailable to the issuer only as to sales of securities to purchasers who were contacted by the Finder whose activities violated a condition of the availability of the exemption being relied upon by the issuer.

#8. Offerings made in reliance on Rule 506 of SEC Regulation D have no limitation on the offering amount whereas the exemptions provided by Rule 504 of SEC Regulation D and SEC Regulation A are conditioned upon a maximum offering amount.¹³ It appears that the issue of imposing an offering size is addressed sufficiently by the conditions imposed by the exemption

¹⁰ 17 CFR 230.506; 17 CFR 230.251(d)(2).

¹¹ See SEC Release No. 33-10824 (August 26, 2020).

¹² Release, page 18, footnote 58.

¹³ 17 CFR 230.504(b)(2); 17 CFR 230.251(a).

being relied upon by the issuer and no separate limitation is required to be incorporated into the Finders Exemption.

#9. The SEC proposes that Tier I Finders be limited to only one capital raising transaction by a single issuer within a 12-month period. This limitation apparently is designed to prevent a Tier I Finder from sending his or her cache of investor contact information to a multitude of issuers.

Since it is often market and economic conditions beyond the control of the issuer that might dictate the timing of a securities offering, there could be a potency where two distinct offerings may arise within a 12-month period which is then followed by a drought of offerings for which an issuer has engaged the Finder. Therefore, the SEC may consider a "rolling" time period. For example, there could be no more than three capital raising transactions within a period of 24 (or 36) consecutive months by not more than three separate issuers.

#10. Please see response to Item 2.

#11. Although the meaning of this term appears self-evident in context of the Release, use of the term "transaction" might be construed as a single sale of securities whereas it is assumed that the SEC means an offering of securities which might be the better term to use.

#12. Please see response to Item 7 with respect to the general solicitation prohibition contained in the Release.

#13. The stated purpose of the Release is to facilitate capital formation for small business issuers which, almost by definition, are those which will avail themselves of exemptions from registration as most, if not all, small business issuers cannot afford the transaction costs associated with an offering registered under Section 5 of the 1933 Act.¹⁴ Also, securities offerings, particularly equity offerings, registered under Section 5 of the 1933 usually involve one or more underwriters that are registered with the SEC as broker-dealers under the 1934 Act.

#14. The Release does not permit a Finder to provide services to an issuer that is required to file reports under Section 13 of 15(d) of the 1934 Act and the Finder may provide services to an issuer only with respect to an offering made by an issuer in reliance upon an applicable exemption from registration under the 1933 Act.¹⁵

Exemptions from registration adopted by the SEC include a limitation on the types of issuers that may rely upon such exemptions and the applicability of those conditions necessarily would limit the type of issuer for whom the Finder could provide services. The question posed is whether there is a type of issuer for which use of a Finder under the Release is not appropriate.

For example, except for any applicable "bad actor" disqualification, any issuer may rely on Rule 506 of SEC Regulation D whereas, in addition to the "bad actor" disqualification, issuers relying on SEC Regulation A are limited to U.S. and Canadian domiciled entities and issuers relying on

¹⁴ *Supra*, note 6.

¹⁵ Release, page 18.

Rule 504 of SEC Regulation D and SEC Regulation A also cannot be a “blank check, blind pool” company or an investment company.¹⁶

Since the stated objective of the Release is to assist small business issuers in their capital formation activities, it may be appropriate to limit the type of issuer which the Finder may represent to a U.S. domiciled issuer.¹⁷ Furthermore, it may be appropriate to prohibit a Finder from representing an investment company registered or required to be registered with the SEC under Investment Company Act of 1940, as amended (the “1940 Act”) or exempt from registration under Section 3(c)(1) and 3(c)(7) of the 1940 Act since the aim of the Release is to promote investment in small businesses and not in businesses whose purpose is to invest the proceeds of the offering in securities of other entities.¹⁸

In a similar vein, Finders relying on the Finders Exemption should not be able to represent issuers who are have no plan of business and therefore should not be able to represent an issuer that “is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with or acquire an unidentified company or companies, or other entity or person.”¹⁹

#15. The issue of using Finders has arisen almost entirely in context of primary offerings of securities by small business issuers and the exemptions from registration under the 1933 Act often used by small business issuers are limited to issuer offerings.²⁰ Therefore, the Finders Exemption should be limited to issuer offerings.

#16. Please see response to Item 14.

Rule 251(b)(4) of SEC Regulation A excludes “fractional undivided interests in oil or gas rights, or a similar interest in other mineral rights.”²¹ Although it could be argued that there are small business issuers engaged in these activities that should be able to benefit from the Release through an offering exempt under Rule 504 or 506 of SEC Regulation D, investor protection concerns over “puffing” by Finders of natural resource “finds” and external economic conditions (eg a rise in copper, silver or nickel prices) which may be used as a pretext for such “puffing” argues for prohibiting Finders from representing such issuers as such “puffing” could constitute a material misstatement or omission of a material fact.

#17. Except as stated in Responses #14 and #16, small business issuers should be able to offer any type of security for which a Finder may be utilized in compliance with the Finders Exemption.

#18-19. The disclosures should mirror those requires by the Cash Solicitation Rule Proposed Amendments.²² This disclosure should note whether the compensation due the Finder will be

¹⁶ 17 CFR 230.504(a); 17 CFR 251(b).

¹⁷ *Supra*, note 6.

¹⁸ 15 USC §80a-3(c)(1), 3(c)(7).

¹⁹ *Supra*, note 16.

²⁰ 17 CFR 230.500(d).

²¹ 17 CFR 230.251(b)(4).

²² Release, page 25.

paid out of the proceeds of the offering and how much of an investor's total purchase price will be used to pay the Finder. For example, if the purchase price is \$10,000 and the Finder is to be paid 10% of the purchase price and the source of compensation to the Finder is the proceeds from the offering, then the investor should be told that, of the \$10,000 being invested with the issuer, \$1,000 of that sum will be used to pay the Finder thereby reducing the purchaser's investment in the issuer to \$9,000.

Although the Release proposes that the mandated disclosures by the Finder to the prospective investor could be made orally "prior to or at the time of the solicitation" provided there is subsequent delivery of the disclosure in writing, the better practice would be to require the disclosures to be delivered in writing rather than orally. This would obviate the potency that the oral disclosures initially given to the prospective investor do not align with subsequently delivered written disclosures.

A requirement for written disclosures at the initial meeting with an investor also would guard against the very real possibility that a Finder, in providing the disclosures orally, unintentionally may forget to provide all the SEC-mandated disclosures or forget entirely to deliver the written disclosures. Since delivery of written disclosures must be accomplished at some point in time, there is no additional burden on the Finder to provide it "prior to or at the time of the solicitation."

#20. For the protection of the Finder and the issuer, a Tier II Finder should obtain a record of acknowledgement of receipt of the required disclosure by the prospective investor and should be required to provide a copy of the acknowledgement to the issuer who the Finder represents. This ensures that, should the prospective investor actually purchase the securities being offered, the issuer has a written record that the investor received the required disclosure from the Finder. If the disclosure is provided by electronic mail, a read receipt for the e-mail should be sufficient evidence of acknowledgement. However, it should be noted that many electronic mail systems permit a recipient to decline sending a receipt even when the sender has requested a receipt.

#21. Since a Tier I Finder's activities are limited to interaction with the issuer and is prohibited from having any contact with investors, there is no need for the Tier I Finder to comply with the disclosure and acknowledgement requirement applicable to Tier II Finders who are eligible to interact with prospective investors.

#22. Please see response to Item 5 suggesting that the issuer be required to provide a Tier II Finder with written offering materials which the Finder would be obligated to provide to persons being solicited.

#23. The only investor protection explanation for requiring a Finder to file a notice with the SEC to claim the Finders Exemption would be for the SEC to verify that the Finder is not subject to a disqualification prohibiting reliance on the Finders Exemption. This assumes that the SEC would devote resources to perform a verification check. In the absence of such a commitment, there appears no reason to require a filing. Furthermore, in a situation where a filing was required but not made, would the failure to file cause the loss of the Finders Exemption?

#24-25. Normally, this should be a matter of negotiation and contract between the Finder and the issuer. However, small business issuers most likely have never used a Finder previously and are not accustomed to what may be an appropriate level of compensation. The more desperate a small business issuer may be with respect to raising capital, the more the issuer may be willing to pay “whatever it takes” to get capital in the door.

The SEC could opt for a “reasonable compensation” standard but such a standard is subjective and what may be reasonable under one set of circumstances may not be reasonable under another set of circumstances.

Where the compensation to the Finder is being paid out of the proceeds of the offering, the amount of compensation directly reduces the amount of proceeds which the issuer can devote to building its business. In such situation, outsized compensation arrangements to Finders have a direct adverse effect upon investors.

In light of these investor protection concerns and concern for small business issuers using a Finder for the first time, the SEC should consider placing a cap on any fee for a Tier II Finder of 8-10% of the price of the securities purchased by the investor solicited by the Finder and, due to the limited service provided by a Tier I Finder, a cap of 3-5% should be considered.

Although it is anticipated that Finders would offer their services in exchange for transaction-based compensation, the option to receive a fixed fee or even an hourly fee should be preserved subject to any applicable caps on overall compensation. A fixed fee may be more appropriate for a Tier I Finder.

Similar to the provision in Regulation Crowdfunding whereby an intermediary may receive a financial interest from the issuer for services provided to the issuer in connection with the offer and sale of the issuer’s securities through the intermediary’s platform, there appears no reason to prohibit a Finder from receiving an equity interest in the issuer as compensation for serving as a Finder for an offering of securities by the issuer.²³ Since small business issuers generally need to husband their finances, compensation to the Finder in the form of a debt instrument (unless it can be converted into equity as the sole instance of the issuer) would not be helpful to the issuer.

#27. Please see response to Item 5. To avoid the potency that a Finder may be tempted to engage in “puffing” which might constitute an omission of a material fact or a material misstatement with respect to the securities offering, the Finder, in discussing issuer information included in any offering materials, should be prohibited from providing or discussing any information which is not included in the issuer’s offering materials.

#28. To use language familiar to the SEC, this is a subjective determination based on the facts and circumstances of each individual situation. This is probably as much guidance as would be appropriate.

However, the SEC may consider requiring the issuer to provide a written representation to the Finder in which the issuer states the exemption it is relying upon for the offering and the

²³ 17 CFR 230.300(b)(1).

conditions of that exemption. This could serve a twofold purpose by (1) having the issuer make an affirmative statement of compliance to the Finder and (2) educating the Finder as to the conditions of the exemption being relied upon so that the Finder is on notice to avoid engaging in those activities which might compromise the issuer's compliance with one or more conditions of the availability of the exemption being relied upon.

#29. Please see response to Item 27.

#30. The *M&A Broker* Letter specifically addressed those activities in which an M&A Broker could engage and receive transaction-based compensation without being required to register as a broker or dealer under the 1934 Act. The question becomes whether an individual who qualifies as a M&A Broker but does not adhere to conditions set forth in the *M&A Broker* Letter nevertheless may rely upon the Finders Exemption. The answer should be in the negative.

A M&A Broker primarily is engaged in activities relating to the sale or purchase of an ongoing business which could be effected through the sale or purchase of securities for which the M&A broker generally receives compensation based upon a percentage of the value of the M&A transaction. The Release addresses an entirely different activity which is an issuer raising capital through the offer and sale of its own securities for which it engages a Finder to identify potential purchasers of those securities.

Thus, the SEC, in its final release, should note that the Finders Exemption is not available to M&A Brokers who, to avoid registration as a broker or dealer under the 1934 Act, must comply with the conditions of the *M&A Broker* Letter.

It also should be noted, as described in the response to Item 1, that the relief provided by the *M&A Broker* Letter also required action at the state level to exempt M&A Brokers from registration as broker-dealers under state securities laws.²⁴

#31. The Release requires that the Finder cannot be "an associated person of a broker-dealer." Does this include only broker-dealers registered with the SEC or does it include broker-dealers that may be exempt from registration?

It is suggested that the SEC should discuss its position as to whether a Finder may be an associated person of an intrastate broker.²⁵ This may be of some interest as intrastate funding portals that facilitate intrastate crowdfunding offerings under Section 3(a)(11) of the 1933 Act and SEC Rule 147A²⁶ rely on the intrastate broker provisions of Section 15(a)(1) of the 1934 Act. Since these funding portals are engaged in the capital raising process principally for small business issuers, they may be interested in acting as a Finder.

#32. If the SEC would dispense with the category of a Tier I Finder as suggested herein, it would then need to determine whether to retain the *Paul Anka* Letter and its progeny. If the SEC

²⁴ See NASAA Model Rule on Broker-Dealer Exemption for M&A Brokers (www.nasaa.org/wp-content/uploads/2011/07/MA-Broker-Model-Rule-adopted-Sept-29-2015-corrected.pdf).

²⁵ Section 15(a)(1) of the 1934 Act does not apply to "... a broker or dealer whose business is exclusively intra state and does not make use of any facility of a national securities exchange ...").

²⁶ 15 USC §77c(11) and 17 CFR 230.147A.

decides to adopt the Tier I Finder category, it may not need to retain the *Paul Anka* Letter and its progeny. As indicated in the response to Item 30, the *M&A Broker* Letter should be retained.

#33. It is recommended that the SEC should include, as an additional disqualification, a situation where the Finder is obligated, pursuant to an award of an arbitration panel, to pay compensation to purchasers of securities and has not paid the awarded compensation in full and in cash.²⁷ If a former associated person of a broker-dealer is subject to an unpaid arbitration award, it may be indicative of that individual's disposition not to follow applicable rules and his or her future compliance with the conditions of the availability of the Finders Exemption may be doubtful. Once the arbitration award is paid, the disqualification no longer would apply.

Another investor protection concern is where a former associated person of a broker-dealer left the brokerage industry due to a high number of investor complaints or arbitrations but otherwise does not come within a category constituting a disqualification under the Finders Exemption.

In this regard, the SEC may wish to consider disqualifying an individual from relying on the Finders Exemption if he or she was the subject of customer complaints or arbitrations which, in the 24 months prior to the most recent termination as an associated person of a broker-dealer, resulted in the settlement of customer complaints or arbitration awards collectively of more than \$50,000. Admittedly, this suggested threshold is arbitrary and, if this suggestion is accepted, may be subject to adjustment.

#34. See response to Item 36.

#35. This query appears to address the likelihood of an individual recently departing employment as an associated person of a broker-dealer to solicit client contacts made during such employment and confusion which may arise if those clients were accustomed to that individual making recommendations concerning the purchase of securities.

The potential for confusion would be that the former clients may view the individual's role as a Finder for a particular issuer as an implicit recommendation to purchase the issuer's securities even though the individual, in compliance with the conditions of the Finders Exemption, is not permitted to provide advice as to the valuation or advisability of the securities being offered. Therefore, it appears reasonable for the SEC to consider a "cooling off" period between an individual's employment as an associated person of a broker-dealer and that individual relying on the Finder's Exemption.

#36. It is suggested that the SEC prohibit investment adviser representatives of SEC-registered investment advisers and state-registered investment advisers (an "IAR") from relying on the Finders Exemption.

Allowing an IAR to act as a Finder under the Finders Exemption could tempt such individuals to solicit their investment advisory clients to invest in fairly risky and illiquid securities offered by small business issuers (including start-ups) which may not conform to the client's investment

²⁷ See Section 305(a.1) and (a.2) of the Pennsylvania Securities Act of 1972 and FINRA Regulatory Notice 20-15 (effective September 14, 2020).

profile because they could receive substantially higher transaction-based compensation than traditional investment advisory fees.

An IAR, particularly an IAR of a state-registered investment adviser, may argue that SEC Regulation Best Interest does not apply as the individual, as a Finder under the Finders Exemption, is not acting as an associated person of a broker-dealer or an IAR of a SEC-registered investment adviser.²⁸

Furthermore, allowing IARs to be Finders would serve to blur the regulatory distinction between individuals who advise on the purchase and sale of securities and those who facilitate effecting transactions in securities.

In providing investment advice, IARs have a fiduciary duty to their clients. It could be argued that the IAR may not be subject to a fiduciary standard when acting as a Finder in connection with effecting transactions in securities. Although the Finders Exemption prohibits a Finder from providing “advice as to the valuation or advisability of the investment,” an investment advisory client being solicited by an IAR acting as a Finder may infer that the Finder is advising on the purchase of the security being offered since the advisory client is accustomed to interacting with the IAR in his or her advisory capacity.

By definition, activities of municipal advisors are limited to dealing with municipal entities or obligated persons with respect to municipal financial products or the issuance of municipal securities.²⁹ Therefore, the opportunity for confusion discussed above does not appear to arise as municipal entities would not be interested in and, most likely, would be prohibited by law from, purchasing securities offered by small business issuers.

#37. If the Finders Exemption excludes individuals who are associated persons of issuers, it would seem to have the effect of prohibiting an individual from representing more than one issuer at a time. Although that limitation is explicit for Tier I Finders (one issuer in a 12 month period), there appears to be no such limitation applicable to Tier II Finders.

Therefore, it appears that a Tier II Finder acting on behalf of an issuer in reliance on the Finders Exemption would be viewed as an issuer agent for that issuer and could not act simultaneously on behalf of another issuer in reliance on the Finders Exemption as he or she would be excluded from such reliance.

#38. The responses to Items 5, 7, 14, 16, 18-19, 20, 24-25, 27-28, 33, and 35-36 herein indicate where the undersigned believes modifications to the Release are required to provide additional investor protections.

#39. Due to the compliance requirements applicable to broker-dealers and regulatory and civil liability risks attendant thereto, it is not economically justifiable for registered broker-dealers to act as a placement agent for an exempt securities offering by a small business issuer. Therefore,

²⁸ 17 CFR 240.151.

²⁹ 15 USC §78o-4(e)(4).

adoption of the Finders Exemption should not pose any competitive issue for registered broker-dealers.

#40. The SEC is to be commended for attempting to bring legal clarity to the issue of Finders by providing, by means of a regulation versus issuance of no action letters, a clear set of circumstances where, although the individual could be acting as a broker, registration is not required.

#41. The approach contained in the Release appears appropriate with modifications suggested herein.

#42. Please see responses to Items 1, 5, 7 and 31.

#43. Please see responses to Items 1, 30-31 and 36.

#44. The undersigned is unable to provide any requested data.

#45. None.

Very truly yours,

A handwritten signature in blue ink, appearing to read "G. Philip Rutledge", with a long horizontal flourish extending to the right.

G. Philip Rutledge